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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1000

THE PETTICREW REAL ESTATE COMPANY,
BANKRUPT,
Petitioner,

vs.

HARRY MUFFLER, AS RECEIVER OF THE PETTICREW REAL ESTATE COMPANY, THE MERCHANTS AND MECHANICS FEDERAL SAVINGS & LOAN ASSOCIATION, AND THE SPRINGFIELD FEDERAL SAVINGS & LOAN ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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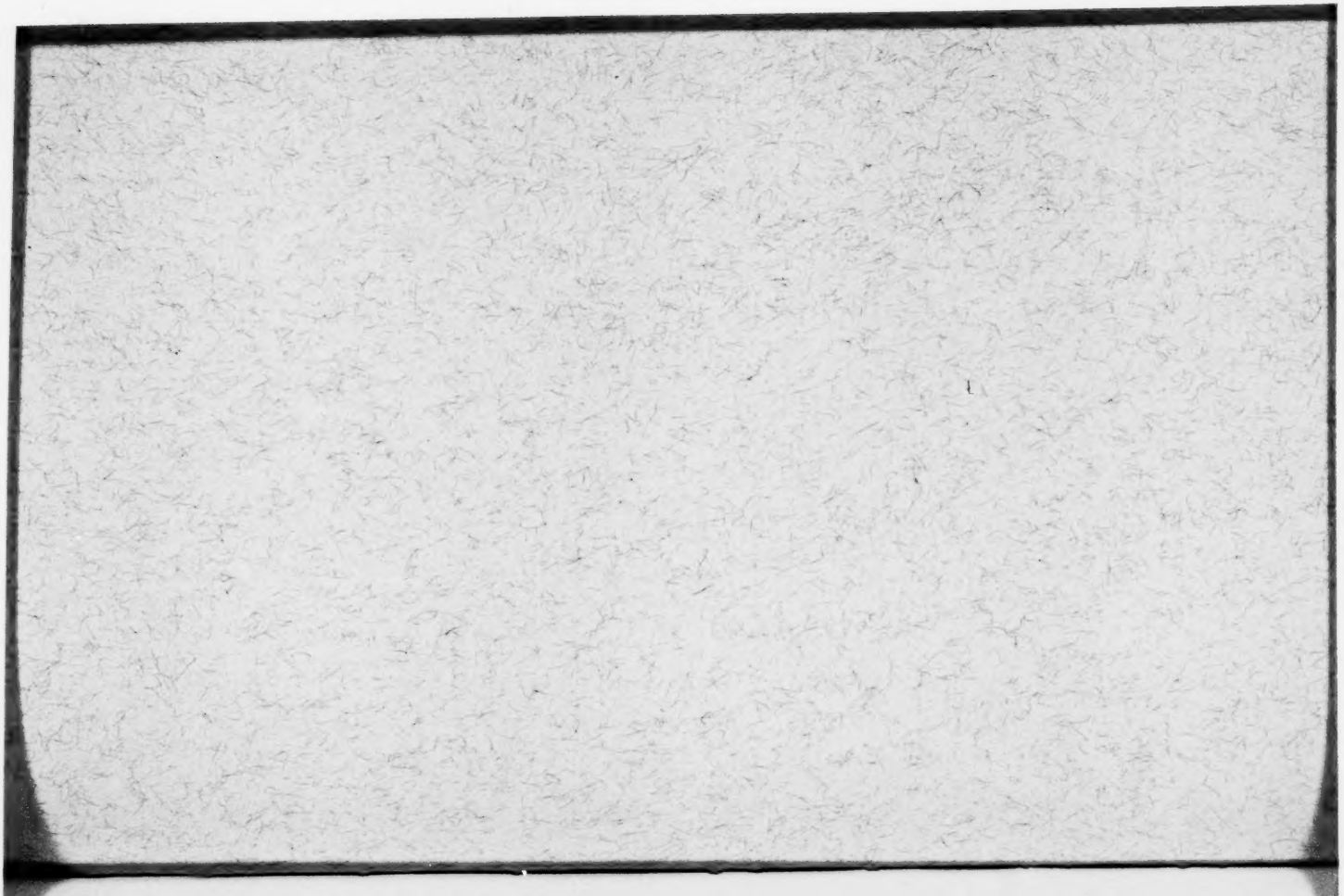

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved.

This case challenges the jurisdiction of the United States District Court in a bankruptcy proceeding where, upon the filing of a petition in bankruptcy, the United States District Court for the Southern District of Ohio, Western Division, issued an order restraining and staying all acts and pro-

ceedings to enforce any lien upon the property of the bankrupt, and he continuation of any suit or proceeding against it until further order of the court.

Harry Muffler, as Receiver of The Petticrew Real Estate Company, the Merchants and Mechanics Federal Savings & Loan Association, and the Springfield Federal Savings & Loan Association, moved for an order dissolving the restraining order, vacating the adjudication of bankruptcy and the order of reference, and dismissing the petition. This motion was denied by the District Court. Whereupon an appeal was prosecuted to the United States Circuit Court of Appeals of the Sixth Circuit from the denial of this motion. Said United States Circuit Court of Appeals in an opinion filed December 1, 1942, affirmed that part of the order denying the motion to vacate the adjudication of bankruptcy and the order of reference, and to dismiss the petition, but that part of the order which denied the motion to vacate the restraining order was reversed, and the case was remanded to the District Court for further proceedings in accordance with that opinion. A motion for rehearing was filed by The Petticrew Real Estate Company, and said United States Circuit Court of Appeals on February 4, 1943, modified its opinion, the modification being as follows. In the original opinion said Circuit Court of Appeals said:

> "* * * However, we think another feature of the case decisive. Since the liens matured more than four months before the present bankruptcy proceedings, and the action to enforce the liens in the state court antedated the filing of the bankruptcy petition, and since the state court had possession of the property, it has exclusive jurisdiction thereof and the District Court, under the decisions of the Supreme Court, was required to dissolve the stay."

After the application for rehearing was filed, said Circuit Court of Appeals on February 4, 1943, struck out the

word "thereof" in the above paragraph, and substituted the following words: "To foreclose the mortgages thereon."

The undisputed facts pertinent to this motion are as follows:

(1) Prior to March 5, 1933, Petitioner was a corporation doing a general real estate business in the city of Springfield, Ohio. The Merchants and Mechanics Federal Savings & Loan Association, and the Springfield Federal Savings & Loan Association, held mortgages upon many parcels of real property then owned by Petitioner.

On March 5, 1933, a receivership proceeding was instituted in the State court and on March 8, 1933, a receiver was appointed, to-wit, Harry Muffler, who took possession of the assets of the corporation, including the real estate.

On February 16, 1938, the receiver filed a petition in the State court, praying that liens be marshaled, that the mortgaged real estate be sold, and for other equitable relief. No deficiency judgment was asked.

The case proceeded in the State Court upon said petition to sell said real estate filed by the receiver on February 16, 1938. The case lay dormant for several years.

(2) On March 16, 1942, the State court entered an order, part of which is as follows:

> "The Court further finds from the evidence that the defendant herein, The Petticrew Real Estate Company, is insolvent and that its assets at their fair, reasonable market value are grossly inadequate to pay, satisfy and discharge the just debts and obligations of said company and that said condition has existed continuously, and did so exist at and prior to the appointment of the receiver herein. The Court further finds that the real estate herein ordered sold as aforesaid constitutes practically all of the assets of said corporation, that said corporation was engaged prior to the receiver-

ship in buying, selling and the development of real estate and that in the event the real estate herein ordered sold has not been redeemed as herein provided, and is sold as herein ordered and decreed, that it is equitable and proper that the receiver herein proceed to wind up the affairs of said corporation and dissolve the same and to sell and distribute the remaining assets of said corporation and apply the proceeds thereof as directed by the Court and that said receiver shall hereafter in such event proceed to make the proper and necessary application or applications and institute the necessary and proper action or actions and proceedings to carry into effect this order and decree.

(3) On April 16th, 1942, and before any appraisement or advertising of sale had been had under the order of sale by the Sheriff of Clark County, The Petticrew Real Estate Company filed its voluntary petition in bankruptcy in the District Court in this cause, upon which an order of adjudication of bankruptcy and reference was entered by the Court on the same day. On the same date, the bankrupt filed its petition in this cause for a stay of the proceedings in the Court of Common Pleas of Clark County, Ohio, upon which, on the same day, April 16th, 1942, the restraining order hereinabove referred to was issued by the United States District Court.

Reasons Relied Upon for the Allowance of the Writ.

By its decision and mandate said United States Circuit Court of Appeals held that when a State court receiver takes possession and custody of real estate, on which real estate there are liens which matured more than four months before the bankruptcy proceedings, it had exclusive jurisdiction to foreclose the mortgages thereon, even though the petition of the receiver to sell the real estate was filed on February 16, 1938, and no court order granting the receiver the right to sell the real estate was made until March 16,

1942, which was thirty days before the petition in bankruptcy was filed. Said United States Circuit Court of Appeals relied in making its decision on the case of *Straton* v. *New*, 283 U. S. 318 (and similar decisions). In the decision of said United States Circuit Court of Appeals it said:

> "Under Ohio law a mortgage upon real estate is a lien from time of record (General Code of Ohio, Section 8542; *Stewart* v. *Hopkins*, 30 Ohio St. 502; *In re Farm and Home Co.*, 84 Fed. (2d) 933, 935 (C. C. A. 6).) The validity of the mortgages is not questioned and they had matured through record a number of years prior to the filing of the bankruptcy petition. The petition for their enforcement had been filed in the state court more than four years before the instant bankruptcy petition was filed. The case therefore seems to be squarely governed by *Straton* v. *New*, 283 U. S. 218; *Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 Fed. (2d) 364 (C. C. A. 6), and similar decisions, and to require the conclusion that the District Court erred in denying the motion to vacate the restraining order. *Straton* v. *New* declared that liens acquired more than four months before the bankruptcy proceedings are instituted, if valid under state law, are preserved and will be accorded priority by the bankruptcy court in distribution of the estate in accordance with applicable local law. It also declared that when under liens thus acquired prior to the four months' period the state court has taken possession of the res for the purpose of enforcing the lien, the District Court sitting in bankruptcy has no power to enjoin the continuation of such action. See *Beeler* v. *Schumacher*, 80 Fed. (2d) 715 (C. C. A. 6). Cf. *In re Conservative Mortgage & Guaranty Co.*, 24 Fed. (2d) 38 (C. C. A. 6), and *Willis* v. *Beeler*, 90 Fed. (2d) 538, 542 (C. C. A. 6.)

Straton v. *New*, supra, lays down twelve principles of law, as follows:

> (1) The purpose of the Bankruptcy is to place the property of the bankrupt, wherever found, under the

control of the court for equal distribution among creditors.

(This is our contention.)

(2) Jurisdiction of a bankruptcy court over the estate of the bankrupt is exclusive within the field defined by the Bankruptcy Act.

(This is our contention.)

(3) Jurisdiction of a bankruptcy court over the property of the bankrupt is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.

(This is our contention.)

(4) After the filing of a petition in bankruptcy, liens cannot be thereafter obtained, nor proceedings had in other courts, to reach the property of the bankrupt, the district court having acquired the exclusive right to administer all property in the bankrupt's possession.

(This is our contention.)

(5) A Federal district court, having acquired by the filing of a petition in bankruptcy the exclusive right to administer the bankrupt's property, may inquire into the validity of liens, marshal them, and control their enforcement and liquidation.

(This is our contention.)

(6) Though a lien be not discharged by bankruptcy, its owner may not without permission of the bankruptcy court, institute proceedings in a state court to enforce it.

(Not applicable.)

(7) A mortgagee may be restrained from instituting or proceeding further in a foreclosure action against a bankrupt, begun after the date of the petition in bankruptcy. (Not applicable.)

(8) A creditor holding a valid judgment against a bankrupt more than four months prior to the date of filing the petition in bankruptcy will be enjoined from

enforcing his lien by suit brought after the date of the petition. (Not applicable.)

(9) As the lien of a judgment entered within four months is avoided in bankruptcy, the court of bankruptcy has jurisdiction to administer the property regardless of the lien, and will restrain the prosecution of an action to enforce it. (Not applicable.)

(10) Liens acquired by legal proceedings more than four months before the filing of a petition in bankruptcy will, if valid under state law, be accorded priority by the bankruptcy court in distribution of the estate, in accordance with applicable local law. (This is our contention.)

(11) Where creditors have obtained and docketed judgments constituting liens on the real estate of the judgment debtor, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, the bankruptcy of the judgment debtor occurring four months after the institution of the creditors' suit does not oust the state court of jurisdiction, or vest in the bankruptcy court power to enjoin further proceedings in the state court, *such a proceeding not being in the nature of a proceeding to distribute assets among creditors,* and discharge the debtor from further liability, but merely a proceeding in equity to do what would be done by a sheriff or marshal under an appropriate writ for the sale of real estate in execution at law. (Italics ours.) (Discussed below.)

(12) The Supreme Court takes judicial notice of state statutes.

Obviously, the eleventh of the above principles enunciated by the Supreme Court is the one upon which said United States Circuit Court of Appeals based its opinion. Yet the distinction between it and the case at bar is most evident. By some almost unbelievable coincidence, the verbiage used by the state court in its entry above quoted

is almost identically the positive of what the Supreme Court said must be negative.

The state court said in its entry (Page 79, R.) "that the receiver herein proceed to wind up the affairs of said corporation and dissolve the same and sell and *distribute the remaining assets of said corporation* * * *".

The Straton case says the state court is not ousted of jurisdiction if "such a proceeding is *not* in the nature of a proceeding to distribute assets * * *".

In other words, the instant case, from the state court's own words, is the direct antithesis of the Straton case.

Petitioner contends that by its decision the said United States Circuit Court of Appeals has practically overruled the Supreme Court of the United States on this question.

The said Circuit Court of Appeals has also by its decision reversed other federal authorities, to-wit: *New River Coal Land Co.* v. *Ruffner Brothers,* 165 Fed. Reporter 881, which held, "A District Court, as a Court of Bankruptcy, has exclusive power to determine whether a unit pending in the state court should be stayed or not, and the exercise of this power rests in the discretion of the Judge, which will not be reviewed by an Appellate Court unless it appears to have been abused." (Also forty-seven other cases which followed said *New River Coal Land Co.* v. *Ruffner Brothers.*)

Said Circuit Court of Appeals for the Sixth Circuit did *not* find that the discretion of the United States District Court, which had exclusive jurisdiction, was abused. The question of abuse of discretion was never pressed by opponents.

In *Mortgage Loan Co. et al.* v. *Livingston,* 78 F. (2d) 520, it was held that

> "The position of appellants is that, before a foreclosure suit can be stayed on bankruptcy of the mort-

gagor its trustee must show that there is an equity in the mortgaged property for the bankrupt estate * * *

"The effect of the action of the District Court in denying foreclosure cannot be so narrowly and strictly defined. The determination of whether a mortgagee shall be permitted to foreclose rests in the sound discretion of the Bankruptcy Court. *Title & Trust Co.* v. *Wernich,* 68 F. (2d), 811, 814.

"While valid liens existing at the commencement of a bankruptcy proceedings are preserved, it is solely within the power of a Court of Bankruptcy to ascertain their validity and amount and to decree the method of their liquidation."

By the decision of said United States Circuit Court of Appeals, the sanctity of Federal jurisdiction over bankruptcy proceedings has been theoretically and nominally upheld. However, in all of its practical aspects, it has stripped the bankruptcy court of all right of discretion, as the decisions almost unanimously support. For all practical purposes, this Court has given the state court exclusive jurisdiction.

Said United States Circuit Court of Appeals said in its opinion:

"* * * the liens are valid from time of record and we must accept the finding of the state court made in the proceeding, which opinion antedated the filing of the bankruptcy petition, that the mortgagees were entitled to foreclose in 1933."

We submit that there is no question as to the validity of the liens from the time of record being the law of Ohio, but something more than the liens being valid must occur in order to give jurisdiction to a state court when a federal court intervenes. It is true that the proceedings antedated the filing of the bankruptcy petition and that the mortgagees

were entitled to foreclose in 1933, but we earnestly submit that that, ipso facto, does not give the state court jurisdiction ahead of the federal court.

These mortgages were merely matters of record for all of these years, and the petition that the court speaks about was permitted to lay dormant from 1938 on. In other words, the mortgages, while alive legally, were dead as far as any action was concerned, and when they were finally revitalized and came to life again, they did so thirty days prior to the time that the petition in bankruptcy was filed. Hence the fact that the liens were valid and the fact that the mortgagees could have foreclosed them in 1933 means nothing, in our humble opinion, as far as the jurisdiction of the United States Court is concerned. It was when the mortgagees decided to act on these liens and took a judgment that the bankrupt came into the United States District Court, and the bankrupt came in seasonably.

The distinction between the eleventh syllabus and the case at bar is most evident. In *Stratton* v. *New*, supra, the Supreme Court said that such a proceeding not being in the nature of a proceeding to distribute assets among creditors, but merely being a proceeding in equity, did not oust the state court of jurisdiction. However, in the case at bar the order of the state court as shown at page 79 of the record is that:

> "* * * the receiver herein proceed to wind up the affairs of said corporation and dissolve the same and sell and distribute the remaining assets of said corporation * * *"

Consequently, we contend that said United States Circuit Court of Appeals recognized in its opinion the right of the state court to liquidate the corporation, which this court, we respectfully submit, had no right to do.

In addition to the above relative to *Stratton* v. *New*, syllabus eleven, the Supreme Court specifically states:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of the judgment debtor and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, the bankruptcy of the judgment debtor occurring four months after the institution of the creditors' suit does not oust the state court of jurisdiction * * *"

How different such a situation is from the instant case. There was no judgment obtained or docketed in the instant case until less than thirty days prior to the time that the bankruptcy proceeding was filed. In other words, the Building and Loan Associations hereinabove referred to, had no judgment lien on the real estate belonging to the bankrupt that had been obtained and docketed until within thirty days of the date of the filing of the petition in bankruptcy.

We feel, therefore, that for all practical purposes the decision of the United States Circuit Court of Appeals in the instant case definitely reverses all of the prior determinations of this matter by the Supreme Court of the United States.

When these judgments and orders of foreclosure were made by the State Court, then for the first time these liens became judgment liens. Therefore they became judgment liens within four months of the filing of the bankruptcy petition, and nobody but the United States District Court and the higher United States courts have the right to determine whether or not they are valid liens. That is the purpose of the provision concerning judgment liens in the Bankruptcy Act.

Therefore Petitioner feels that because of the conflicts in opinions hereinabove referred to, that the Honorable Su-

preme Court of the United States should hear and determine this matter.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

SIDNEY G. KUSWORM,
Counsel for Petitioner.

(6002)

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IN THE

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OCTOBER TERM, 1942

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Petitioner,

vs.

HARRY MUFFLER, as Receiver of the Petticrew Real Estate Company, the Merchants and Mechanics Federal Savings & Loan Association, and the Springfield Federal Savings & Loan Association,
Respondents.

BRIEF OF RESPONDENTS ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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BRIEF OF RESPONDENTS ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Chief Justice and the Associate Justices, Honorable Justices of the Supreme Court of the United States of America:

In reply to the petition and brief of counsel for the petitioner herein for a writ of certiorari from this Honorable Court to the United States Circuit Court of Appeals for the Sixth Circuit to certify its record in cause No. 9264 before said Circuit Court of Appeals, these counsel for respondents respectfully beg leave to submit to this Honorable Court this brief:

THE FACTS

Because of the omission by petitioner of certain facts pertaining to the proceedings in the lower courts, respondents believe it advisable to set forth a complete chronological statement.

In 1933 an action was commenced in the Court of Common Pleas of Clark County, Ohio, a court of original and general jurisdiction, for the appointment of a receiver for the petitioner, The Petticrew Real Estate Company. One of the respondents, Harry Muffler, shortly after the action was instituted was appointed and qualified as a general receiver with authority to operate the business. (Record page 14, 15, 16)

The receivership has been in continuous operation since created. On February 16th, 1938, the receiver filed a petition in the proceedings for the sale of certain real estate, assets of the corporation, to which a number of additional parties including respondents, the Merchants and Mechanics Federal Savings and Loan Association and the Springfield Federal Savings and Loan Association, were made parties defendant. (Record page 17 et seq.) On June 18th, 1938, respondent Savings and Loan Associations intervened by cross-petition setting up mortgage liens asserted by them upon each of the various tracts of real estate described in the petition for authority to sell and praying the court for an order of foreclosure, adjudication of the amounts and priorities of their respective mortgage liens, marshalling of liens and other incidental relief. (Record page 42 et seq.)

Before a hearing was had by the court upon the issues, March 1st, 1939, The Petticrew Real Estate Company filed

a petition under Chapter Ten of the Bankruptcy Act (The Chandler Act) in the District Court of the United States for the Southern District of Ohio for a reorganization. During the pendency of this proceeding the proceedings in the Court of Common Pleas were enjoined and the assets of the petitioner placed in the custody of a trustee appointed by the District Court where they remained until May 22nd, 1941 when an order was entered by the District dismissing the petition for reorganization and remanding the assets of the corporation to the receiver and Court of Common Pleas. (Record page 168, 169)

On March 16th, 1942, after a trial by the Court of Common Pleas, the court ordered that unless certain specific amounts found due on each of the respective mortgage liens upon the various tracts of real estate were paid within a date fixed by the court, that an order of sale should issue and the various mortgages be foreclosed.

The court also found that the real estate constituted the greater portion of the assets and that the receiver should proceed to wind up the corporate affairs under directions of the court. (Record pages 72 to 79 inc.) The Record also sets out the decision of the Judge upon which the order of foreclosure was entered. (Record pages 80 to 96, inc.)

On April 16th, 1942, before sale could be had of the real estate upon the order of foreclosure, petitioner filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of Ohio and on the same day, the bankruptcy court entered an adjudication of bankruptcy, order of reference and a re-

straining order enjoining further proceedings in the Common Pleas Court.

On April 23rd, 1942, respondents filed a motion in the bankruptcy proceeding for an order of dissolution of the restraining order issued by the bankruptcy court. (While the motion embraced other matters than the dissolution of the restraining order, only the action of the District Court and the Circuit Court of Appeals upon the motion to dissolve the restraining order is the subject of review now before this Court.) See Record pages 99, 100 and 101.

The bankruptcy court overruled the motion to dissolve the restraining order. An appeal was taken by the respondents to the United States Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals reversed the District Court and remanded the cause with instructions to the District Court to sustain the motion to dissolve the restraining order.

This proceeding is prosecuted for the purpose of a review of the judgment of the United States Circuit Court of Appeals.

The only assets of the bankrupt involved in these proceedings are the respective tracts of real estate upon which the two Savings and Loan Associations were found to have had valid and existing mortgage liens which were ordered foreclosed and the real estate sold to satisfy the amounts found due on each mortgage. No judgments, or judgments for any deficiency, were rendered other than findings of the amounts due and the order of sale. Other assets than the real estate involved in the foreclosure proceedings are subject to disposition by the bankruptcy court and its trustee who was duly appointed in the bankruptcy proceeding.

LEGAL QUESTIONS INVOLVED

We believe that the legal question in this cause can be summarized thus:

> Where a State Court of competent jurisdiction has acquired custody of a res in a proceeding to foreclose specific mortgage liens which were in existence, and were ordered foreclosed in an action for that purpose, more than four months prior to the filing of a bankruptcy proceeding generally, does the jurisdiction of the bankruptcy court supersede that of the State Court so as to deprive the State Court of jurisdiction to proceed to a final disposition of the foreclosure proceedings: especially where the proceedings in the State Court had reached the stage of a final determination and decree of foreclosure and an order of sale? Under such circumstances, should a Court of Bankruptcy exercise or have the authority to enjoin further proceedings by the State Court?

ARGUMENT

It is the opinion of the respondents that the principle involved is one of comity between courts, rather than one of jurisdiction. We believe that it has been firmly settled by the Supreme Court of the United States, that as between two judicial tribunals of co-ordinate and concurrent jurisdiction, under circumstances such as the case now under consideration, that court which first acquires jurisdiction of a res, also acquires the right to proceed to a final conclusion without interruption, unless there is some positive requirement of law to the contrary. That where an action has been brought in a State Court of competent jurisdiction to enforce a specific lien which is not itself invalidated or avoided by bankruptcy, the subsequent institution of bankruptcy proceedings does not operate to suspend the proceedings in the State Court, nor de-

prive it of jurisdiction to proceed to a final disposition of the res actually in its custody; especially is this true where the proceeding to foreclose or enforce the lien is instituted more than four months prior to the filing of the bankruptcy proceeding.

As nearly as we can gather from the brief of the petitioner, it is contended that because the foreclosure proceeding in the State Court had not proceeded to a judgment and decree of foreclosure until within four months immediately preceding the filing of the voluntary petition in bankruptcy by the mortgagee, the bankrupt, that the judgment and decree of the State Court foreclosing the mortgage liens, constituted a "lien" acquired on the property of the bankrupt within the preferential four months' period invalidated by the bankruptcy act. While petitioner does not expressly so state, we infer that their reasoning is on the basis of a *merger* ex proprio vigore of the mortgage lien in the judgment and decree of the court. At least this cannot be true to invalidate liens which are not specifically invalidated by the Bankruptcy Act itself or by some other positive rule of law. Actually the validity and existence of the mortgage liens themselves have never been in controversy, and even if they had been the judgment and decree of the State Court became final and conclusive and is entitled to full faith and credit and not subject to collateral attack. Independent, however, of the judgment and decree of the State Court, the liens held by the mortgagees upon the various tracts of real estate are liens by virtue of the mortgages and were not liens created by the court or the proceeding in which the court rendered judgment of foreclosure.

It also appears to be urged by the petitioner that be-

cause bankruptcy intervened before a sale could be had under the decree of the court, that bankruptcy obliterated all the proceedings and decrees of the State Court and opened up the entire subject matter to an adjudication de novo by the bankruptcy court.

Such conclusions we believe are erroneously conceived by the petitioner for two cogent reasons, viz:

1. If the rules of law pertaining to comity and conflict of jurisdiction between co-ordinate courts, in the matter of adjustment of conflicting jurisdiction, are to be confined exclusively to only those judicial proceedings which reach a final and complete stage of procedure before the intervention of bankruptcy, there could be no reason or occasion for the existence of that body of administrative law.

2. Petitioner fails to make distinction between liens created or the result of judicial proceedings, and proceedings to enforce liens which were acquired independently of judicial proceedings and in existence more than four months next preceding the bankruptcy.

At this stage, it seems proper to inform the court that in the State of Ohio, mortgage liens upon real estate are created through an instrument in the form of the ordinary common law warranty deed of bargain and sale, with a defeasance clause or condition subsequent, providing that the conveyance shall become void upon the performance of a specified condition, usually the payment of money, as in the case at bar, but not necessarily so. By statutory law, such instruments are required to be recorded in public records of the County wherein the lands are situate, and are effective as liens from the time of such record until barred by limitation, or the condition has been discharged by the mortgagor or his successors in interest and estate. By judicial construction, the mortgagee is

deemed vested of the legal title and the mortgagor to hold "an equity of redemption" in the lands. The remedies of the mortgagee are two; sale under judicial foreclosure proceedings which cut off the equity of redemption, and ejectment which does not cut off the equity of redemption which continues until barred by statutory limitation. The latter remedy is rarely resorted to. In the instant case, the Common Pleas Court proceeded to a foreclosure upon the cross-petition of the mortgagees, respondents herein, praying for that affirmative relief. (Record bottom page 80, top page 81 and Decree of Court, Record page 78). The mortgages and liens of the two Savings and Loan Associations were in existence at and prior to the time when proceedings were first instituted in the State Court, May 8th, 1933, (Record page 82 and 83). All of them had been duly recorded.

It is also urged by petitioner, without assigning any specific reason for the conclusion, that by reason of inaction of the Court of Common Pleas from March, 1939 to June, 1941, that the mortgage liens became "dormant" and were only revivified by the decree of the court in March, 1942. No reference, however, is made to the fact that this is the period in which a petition for reorganization under The Chandler Act was pending and further procedure by the State Court in foreclosure had been enjoined by the Bankruptcy Court. Such a contention is manifestly without legal foundation.

Without quoting at length, we respectfully refer the Court to Volume 5 of Remington on Bankruptcy, Fourth Edition, Section 2042, page 96, § 2067, page 139, § 2070, page 141 and § 2103, page 190. Summarizing the text of the author quoted, it is stated that a State Court first ob-

taining the possession of property, afterward claimed through bankruptcy proceedings, retains jurisdiction to the end, with but three exceptions: viz; where possession by the State Court creates a lien by the proceedings within the four months' period; where the proceedings in the State Court are tantamount to bankrutcy or insolvency proceedings; and where the proceedings in the State Court involve a receivership, assignment for the benefit of creditors or similar proceeding, created within four months next preceding the filing of the bankruptcy proceeding. An action in foreclosure, or to enforce a lien not created by the action itself and that is not in contravention of the peculiar provisions of the bankruptcy act nullifying liens obtained by legal proceedings or constituting a preference avoided by the Act, is not an action abated by the bankruptcy proceeding whether instituted within the four months' period or not. The same view of the law is stated in Collier on Bankruptcy, Fourteenth Edition, Volume 1, page 304, and Note 19 on page 308. Such has been the decision of this Court, as we construe it, and as interpreted by the Circuit Court of Appeals in the case of

Stratton v. *New,* 283 U. S. 318.

This Court has recently reaffirmed *Stratton* v. *New* in the recent case of

Emil v. *Hanley, Supreme* Court Law Edition
Advance Opinions Volume 87, page 643
Supreme Court Reporter, 687
U. S. Law Week, 4248.

At the time of the writing of this brief, we are not able to cite the official reports of this court. Both these cases affirm the right of the State Court to proceed to a con-

clusion of the foreclosure proceedings notwithstanding the filing of the bankruptcy petition or the adjudication of bankruptcy.

We believe it might have been maintained that the entire receivership proceedings in the State Court had a right to continue, but that question has never been advanced or presented by respondents nor do we now propound it. Respondents rely wholly upon the proposition that the proceedings of the State Court upon the application of the mortgagees on their cross-petition for the affirmative relief of an order of foreclosure of their mortgages upon the tracts of real estate involved is a proceeding, upon the authority of the decisions of this Court, which had and has the right under the principles of comity, to proceed without interference and to a final conclusion, notwithstanding the bankruptcy proceeding and that the District Court as a Court of Bankruptcy erred in issuing a restraining order enjoining further procedure in the State Court upon the foreclosure proceedings and in refusing to dissolve the injunction by the overruling of our motion to dissolve the same. That the Circuit Court of Appeals correctly decreed that the restraining order be dissolved and that the State Court and the respondents, the Merchants and Mechanics Federal Savings and Loan Association and the Springfield Federal Savings and Loan Association, have the right to proceed with the foreclosure of their mortgages and the sale of the real estate upon which they hold their mortgage liens, notwithstanding the bankruptcy. The Court will note that the foreclosure proceeding was a separate or separable proceeding for affirmative relief upon the cross-petition of the respondents specifically seeking foreclosure of their mortgages, and irrespective of the petition of the receiver to sell assets of the corporation. And it was so

treated by the trial court (Record bottom page 80, top page 81) which we quote herewith:

> "As the court summarized the issues, there are only two involved or to be determined. The first of these is whether or not the two Savings and Loan Associations hold valid mortgage liens upon the various tracts of real estate, and if so, the amounts of each of the mortgage debts secured thereby, the state of the lien of the mortgage as to priority, the conditions and terms of the mortgages and whether or not, aside from special considerations, the mortgagees are entitled to have their mortgages foreclosed and the properties sold and the proceeds applied to the satisfaction of the mortgage debts. Incidental to this issue, are the matters and rights of other parties defendant as regards liens or other interests which may appear to be necessary to be determined in connection with the title of the defendant corporation and interests to be sold, in the event a sale is found to be necessary."

The Court will further note that in the judgment entry following the Court's decision entered March 16th, 1942 (Record page 78) the foreclosure of the mortgage liens is ordered as a separate and distinct part of the decree, entirely severable from the direction of the Court to the receiver as to disposition of other assets and the future course of the receivership. Such procedure upon the part of the State Court does not infringe upon any of the provinces of the Bankruptcy Court. Under the circumstances, the only right or interest of the proceedings in bankruptcy are, and should be confined to, the turning over to the trustee in bankruptcy upon proper application or direction of any surplus that may remain from the sale of the mortgaged real estate after the satisfaction of the respective mortgages.

In conclusion, may we not also call the Court's attention to the fact that the Record discloses (pages 39, 40 and 41) that a large number of other individuals were made parties defendant to the foreclosure proceedings for the adjudication of various interests in the same real estate upon which the mortgage liens existed. Manifestly the numerous, necessary and proper parties to a complete determination and the clearing of the title to the real estate involved, rendered the State Court proceedings peculiarly adapted and fitted from an equitable standpoint, and manifestly to the benefit and not the detriment of all parties having an interest in the bankrupt's estate. It would seem that under the circumstances, a Court of Bankruptcy should have been hesitant to interfere. Certainly no advantage or benefit could be secured by the interruption or suspension of the proceedings in the State Court to the accrual of other creditors whose rights and interests cannot be enlarged by the bankruptcy proceeding. There is no question of a preference invalidated by the bankruptcy proceeding involved. The order of preference and priority in distribution of the proceeds would remain the same; they are concluded by the proceedings in the State Court.

Respectfully submitted,

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